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IN THE

Supreme Court of the United States

October Term, 1963

No. 1054

HARRY F. WERLING and FRANCES C. WERLING,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Harry F. Werling and Frances C. Werling pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered March 31, 1964 affirming the judgments of the United States District Court for the Western District of Pennsylvania finding petitioners guilty of four counts of income tax evasion (26 U. S. C. 7201) and sentencing them each to a total of two years imprisonment and a fine of $10,000.00.

Opinions Below

There was no opinion filed by the United States District Court for the Western District of Pennsylvania. The

United States Court of Appeals filed its opinion on March 31, 1964; a copy of it is attached hereto as Appendix "A". This opinion has not yet been officially reported.

Jurisdiction

The sentences and judgments of the District Court were entered on July 25, 1963. The judgment of the Court of Appeals was entered on March 31, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Should a conviction for willful evasion of income tax be set aside where all the evidence considered in the light most favorable to the government's case shows the petitioner Harry F. Werfing had no knowledge of and did not participate in to any extent in the maintenance of the records or preparation of income tax returns?

2. Should a conviction for willful evasion of income tax be set aside where there is absolutely no evidence from which an "overt act evincing an "evil motive" to evade taxes could be found?

3. Should a conviction for willful evasion of income tax be set aside where the District Court and the Court of Appeals by error have failed to follow the law as set forth by this Honorable Court in its decisions in *Spies v. United States*, 317 U. S. 492, *United States v. Holland*, 340 U. S. 121?

4. Did the trial Court err in admitting evidence including the opinion of a government agent, which expresses an opinion on an examination of records not a part of the record?

Statutory Provisions Involved

Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years or both, together with the costs of prosecution (26 U. S. C. 1958 ed., Sec. 7201).

Statement of the Case

Defendants, husband and wife, were indicted on four counts each, on charges of having willfully and knowingly attempted to defeat a large part of the income tax due and owing by them to the United States for the years 1956, 1957, 1958 and 1959 by filing false and fraudulent tax returns for those years.

There was little dispute between the government and the defense as to the facts of the case. The defendants, since 1949, owned a business known as the Central Garage. There they sold gasoline, oil and serviced automobiles and trucks. They also sold some items of hardware and had an agency for the sale of trucks manufactured by International Harvester Company. In addition they also owned buses which were used to transport students to and from various schools in Crawford County, Pennsylvania. Additionally they owned trucks which were used in road construction work. Mr. Werling also owned certain road construction equipment jointly with one Clayton Danforth and he and Mr. Danforth contracted for road construction

work wherein they used their jointly owned equipment as well as trucks owned by each of them individually.

There is no conflict whatsoever in the testimony that, during the entire relevant period, Mrs. Werling kept all the books and records for her husband and herself, as well as for Mr. Werling's joint business activities with Mr. Danforth (10a, 23a). Mr. Werling made no entries in the books and had no part in their maintenance. (11a-13a). His sole role in maintenance of records was to estimate how long a piece of machinery would last for purposes of setting up depreciation schedules (23a).

When the Werlings began their business venture in Central Garage in 1949, they had a system of books set up for them by a Certified Public Accountant in Titusville, Pennsylvania (251a-253a). For about a year thereafter, postings were made to those books by the accountant from cash register tapes and check stubs. Because of the cost involved, Mrs. Werling took over this task in the latter part of 1950. She, at first, attempted to follow the system set up, but later attempted to simplify after seeking the advice of a neighbor who worked in a bank (253a-254a).

The books, as originally set up, followed the accrual method of accounting, but, after Mrs. Werling made her changes, they can best be described as "hybrid". In the garage business, all cash and credit sales were rung up on a cash register. These were then posted to the books and became the basis for income records. When payments were made on accounts owing, these were rung up as "accounts receivable" (255a-256a).

As a part of the defendants' business, they furnished gas and oil as well as maintenance to each of the trucks owned by them. Mrs. Werling treated each vehicle as a

separate customer and charged each item furnished as they would have done if it had been for an independent customer. They fell into serious error, however, when payments were received for use of the trucks. She treated such receipts as payments on account and so recorded them on cash register tapes and, eventually, upon her books. The effect of this was that these receipts were never reflected in income. This was the largest part of the unreported income. (258a-260a).

There was an additional source of unreported income. Clayton Danforth owned some trucks individually as did defendant Harry Werling. Both were used in their road construction work. Danforth was unable to pay the employees on his trucks, so he and Werling agreed that they would be paid out of a joint bank account maintained by them. Since Werling was paying his own employees separately, a system was established whereby each time a check was drawn for Danforth's employees, a check in a similar amount was made payable to Werling. Mrs. Werling treated these payments in the same manner that she treated payments due for use of Werling's trucks.

The method of compensation for trucks by the joint venture was that either the using party made separate checks to Werling and Danforth for this, or the parties determined which part of any job was for trucks and which was for jointly owned equipment. They then paid out to Werling and to Danforth the amount due them for use of their individually owned trucks. Those due Werlings were deposited (with a few exceptions) to the Central Garage account. Since these were being treated by Mrs. Werling as payments on accounts receivable, they were not entered into the books as income. This item makes up the

substantial remainder of the unreported income. (There was also a small amount of interest from a savings account omitted in one taxable year).

At the end of each year, Mr. and Mrs. Werling called upon Allen Love, a local tax collector and police magistrate, who made out their tax returns (19a). Mrs. Werling, who kept all records for her husband as well as those of the joint venture, prepared a "ledger" which was, in effect, a summing of her postings from the register tapes and check stubs. She also prepared a summary of the joint venture along with Mr. Clayton Danforth. These she would read off to Mr. Love and from them Love prepared their annual tax returns.

The income from use of trucks was not being reflected in income since it was being credited to payments on accounts receivable. The checks to equalize Danforth's payments to employees were similarly treated and not being reflected on income. Thus, there was a substantial understatement of income which caused the return to indicate a loss in each indictment year, as well as for several prior years. The defendants were unable to understand this and asked Mr. Love for an explanation. He explained that these were the "figures" he had been furnished and that the loss was a result of a large depreciation allowances on equipment. He told them that after the depreciation was all taken, they would have a large tax to pay (26a-27a). In fact, he spoke of large "net worth increases" (27a-b), leading them to believe that, eventually, they would pay tax on this, and for this reason a savings account was set up.

To establish "wilfulness", the government was allowed to introduce in evidence the fact that in a year that they

were showing loss; they made home improvements to the extent of $10,000.00. Further, over defendant's objection, an Internal Revenue Agent was allowed to testify to a conclusion that from his examination of certain checks and check stubs, a change in record keeping had been made in 1952 and that, for 1951 and 1952 the receipts from trucks had been recorded as cash sales, rather than payments on accounts receivable (150a-155a). Mrs. Werling denied any knowledge of such a change, but admitted that she had changed her system around that time, after discussion with Mr. Mason, her banker neighbor. Mr. Love had also suggested changes.

There was no conflict in evidence that Mr. Werling had no knowledge of or part in keeping of books and records.

The defendants moved for judgments of acquittal at the close of the government's case and again after all evidence had been introduced, both of which were denied. The jury returned verdicts of guilty as to each defendant upon each of the counts. The Court then imposed a sentence upon each of a fine of $2,500.00, costs and six months' imprisonment on each counts prison terms to be served consecutively. Upon payment of the fines, the prison terms were to be reduced to one year each.

The trial Court indicated to counsel for the defendants that it was useless to file any motions after verdict as he would not change his mind. The Court of Appeals filed a *per Curiam* opinion.

Reasons for Granting the Writ

It is important that this Court grant certiorari because of the growing tendency of the District Court and the Appellate Court to surrender their obligation to insure

that there is sufficient evidence to sustain a conviction. This Court has on numerous occasions set forth the tests for willfulness in income tax cases, but it has not, it is submitted, set forth the duty of the trial judge and the Court of Appeals to determine whether there is evidence sufficient to sustain a conviction.

Petitioners we submit are entitled to a review and an opinion by the District Judge and the Court of Appeals as to whether they applied the tests that this Court has set forth.

In this case the defendants were found guilty of willful evasion of income tax. However, as to the husband defendant Harry F. Werling it is not disputed that he had no knowledge of nor did he participate in the maintenance of the records or the preparation of the income tax returns. The books were kept by Mrs. Werling. It was also not disputed that she made some mistakes. However, there is no evidence that Mr. Werling knew anything about keeping the books. The issue then is quite simple. Does the fact that a wife "bookkeeper" makes mistakes permit an inference of guilt from which a jury can find a husband guilty of willful evasion of income tax?

This Court in *U. S. v. Holland*, 340 U. S. 121 (1954) held, that:

> "A final element necessary for conviction is willfulness. The petitioners contend that willfulness involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income. This is a fair statement of the rule . . ." (Emphasis ours).

It is submitted that the Court of Appeals for the Third Circuit has by their decision in the instant case, decided a federal question in a way to conflict with the applicable decisions of this Court. In *Murdock v. U. S.*, 290 U. S. 389,

this Court held that a wilful violation is an essential requisite, and the Court of Appeals in various cases has held that evil purpose or bad purpose is required. Gaunt vs. U. S., 184 F. 2d (CA-4 1950); Haigler vs. U. S. 172 F. 2d 986 (CA-10, 1949); Battjes vs. U. S., 172 F. 2d 1 (CA-6 1949).

In *Spies vs. United States*, 317 U. S. 492 (1943), this Court held that there must be a positive attempt to evade the tax. All the government was able to show, at the most, was that there was an under statement of the income and that Mrs. Werling who kept the books made mistakes. They have shown nothing that would indicate an evil motive. They have not shown that Mr. Werling did anything.

We submit that this Court has set forth what tests must be followed to determine willfulness. While it has done this, in its supervisory powers over the lower Courts it cannot permit the lower Courts to allow a jury to guess whether there has been a willful violation. The trial Judge filed no opinion, and the Court of Appeals in its one paragraph opinion points to no evidence, but only states it is for the jury. Not only is it important for this Court to set the guide lines to be followed, it must also see that they are followed.

The issue is clear. May a jury be permitted to speculate on willfulness, where there is no evidence that the husband defendant kept the books or knew anything about them, especially when any error in the amount due is shown to have been as a result of a bookkeeping error and there is no evidence that the defendant husband directed or supervised the bookkeeping. Here the evidence is to the contrary, as he in good faith relied on the bookkeeping done by others and tax returns prepared by others.

The test is not whether a charge of the Court is correct, but whether there is anything to submit to the jury.

A very elementary constitutional issue is involved in this, and while it is elementary and simple, it is of vital importance. May the Courts always say the matter of willfulness in a criminal case is always for the jury? Does not the Court first have the duty to be certain there is an issue for the Jury?

In *Holland vs. U. S.*, 317 U. S. 121 this Court held that intent to evade income tax could be inferred from a consistent pattern of under statement of income over a period of years. However, the Court of Appeals went further in this case and by their opinion has held that willfulness can be inferred where there was a mistake made in the bookkeeping system of which the Defendant Harry Werling had no part. This we submit, permitted a jury to guess. This is contrary to the decision in the *Holland case, Supra.*

With the importance of this question of willfulness, prejudicial error was committed when the government agent was permitted to testify over objection as to an opinion obtained from evidence not a part of the record. The Court of Appeals, did not follow its own decision in United States v. Michener, 152 F. 2d 880 (3rd Cir. 1945); United States v. Ward, 169 F. 2d 460 (3rd Cir. 1948).

Here the agent was permitted to testify that he heard all of the testimony in this case, that he was familiar with exhibits introduced in evidence and what he learned through his investigation. This method was far different from the accepted normal pattern in which a tax loss is developed by a hypothetical question based on evidence in the record. The agent testified his opinion was based on everything he learned in the case. The result was that an agent was

permitted to testify from what he believed the evidence to be. Another agent was permitted to testify as to a change in bookkeeping method years prior to the first indictment years based upon his opinion from records which were not in evidence. Nothing could be more prejudicial.

We of course, recognize that many cases come before this Court for Review. Some have important and involved constitutional issue involved.

The tax laws are important to all of us, but our liberties are more important. This Court we submit should grant our petition for certiorari in order to review the practice of permitting the agents of the government to give opinions based on their investigation when not a part of the record and to be sure that an individual is not convicted for a mistake. A jury should not be permitted to speculate on willfulness, this Court should clearly set forth the duty of the trial Court and the jury in this regard.

Conclusion

For the reasons set forth herein we respectfully submit that this Petition for Writ of Certiorari should be granted.

HUBERT L. TEITELBAUM,
MARTIN M. SHEINMAN,
Attorneys for Petitioners.

Certificate of Service

I certify that I have served five copies of the foregoing Petition upon the Solicitor General of the United States Department of Justice, Washington D. C. by placing them in the United States mail addressed to him.

MARTIN M. SHEINMAN,
An Attorney for Petitioners.

Appendix "A"

OPINION OF THE COURT

(Filed March 31, 1964.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,541

UNITED STATES OF AMERICA,

v.

HARRY F. WERLING and FRANCES C. WERLING,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 5, 1964

Before McLAUGHLIN and FORMAN, *Circuit Judges*, and LEAHY, *District Judge*.

PER CURIAM.

This appeal was argued thoroughly and most competently on behalf of the appellants. However, we are not

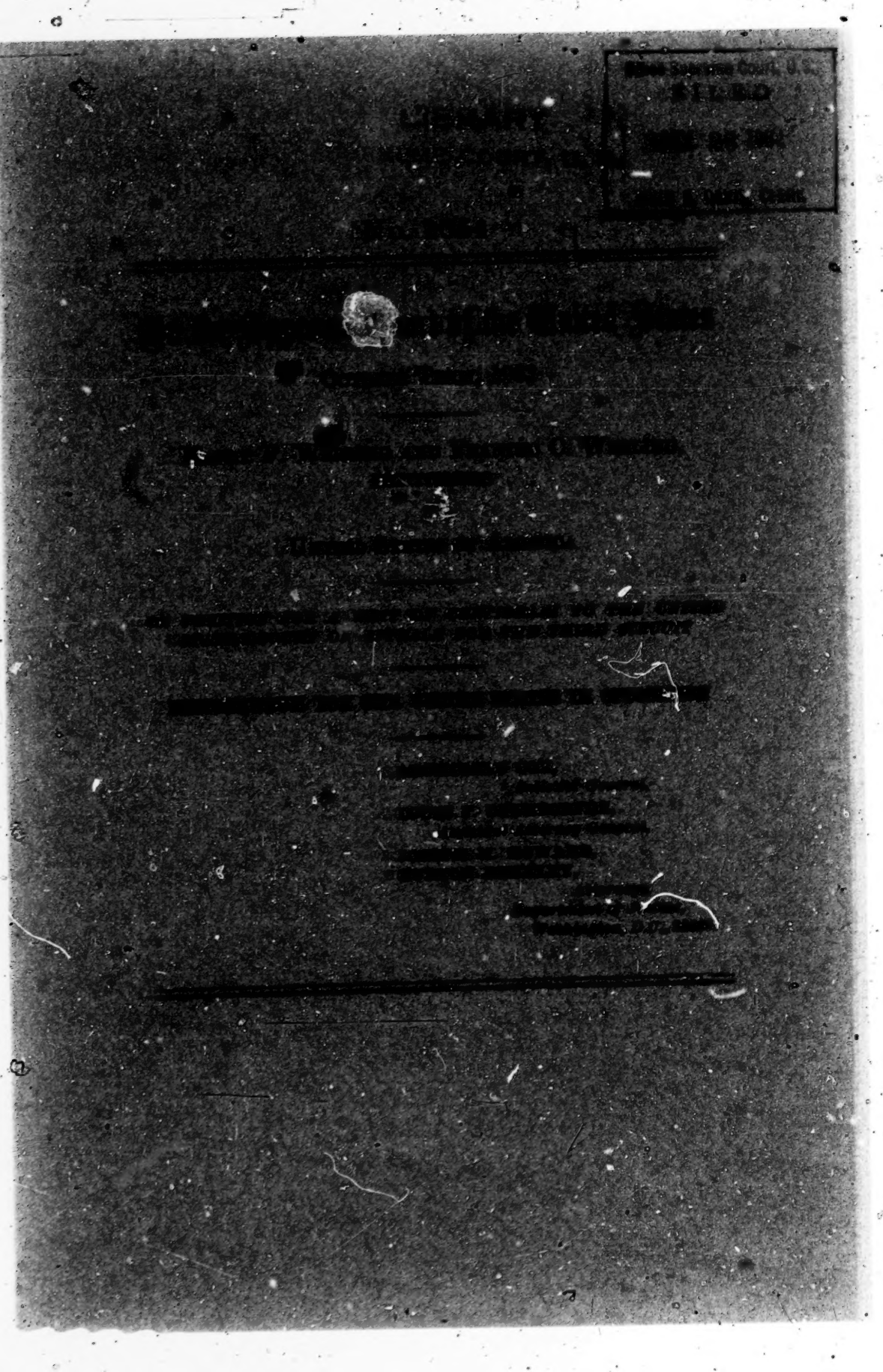
sitting as triers of the fact. And, in our appellate function, we must recognize that there was sufficient evidence to necessitate submission of the case to the jury and to adequately support the jury's decision as to both defendants.

The judgments of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1054

HARRY F. WERLING AND FRANCES C. WERLING,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 6, 1963, a four-count indictment (R. 5a–8a) [1] was returned against petitioners, Harry F. and Frances C. Werling, in the District Court for the Western District of Pennsylvania, charging them with having willfully attempted to evade and defeat a large part of their income taxes for the years 1956

[1] "R" references are to the appendix to petitioners' brief filed in the court of appeals.

through 1959.[2] After a jury trial, each petitioner was found guilty on all counts, sentenced to a total of two years imprisonment, and fined a total of $10,000. (R. 2a–3a.)[3]

Petitioners' income came from four sources during the indictment years—a service station, a partnership engaged in road construction, truck rentals, and bus routes. (R. 31a, 36a, 202a–203a, 205a; Supp. R. 11b–13b, 15b).[4] In 1950 an accountant had set up a bookkeeping system for the petitioners and he kept the books for a short time thereafter. (R. 159a, 252a–253a.) In 1951 Mrs. Werling began to keep the books herself, changing the bookkeeping system from that of the accountant to the one used in the indictment years. (R. 160a–161a, 183a–184a, 191a–192a.)

A very large portion of the petitioners' income was not reflected in the books kept by Mrs. Werling or

[2] The amounts of unreported income and of unpaid taxes as alleged in the indictment were as follows:

Count	R., Page	Year	Reported Adjusted Gross Income (Loss)	Actual Adjusted Gross Income	Reported Tax	Actual Tax Owed
1	5a–6a	1956	($382.31)	$17,351.16	0	$3,483.35
2	6a	1957	($916.05)	$32,307.32	0	$9,228.44
3	7a	1958	($8,258.07)	$25,059.03	0	$5,138.43
4	7a–8a	1959	($134.60)	$22,610.79	0	$3,215.67
Totals			($9,691.03)	$97,328.30	0	$24,067.89

[3] The sentences provided for reduction of the imprisonment to one year if the fines were paid within 60 days. (R. 2a–3a.) They were, and the terms of imprisonment have been reduced accordingly. (R. 4a.)

[4] "Supp. R." references are to the Appendix to the government's brief filed in the court of appeals.

on the petitioners' tax returns after 1952. (R. 150a–152a.) The major item in this category was truck rentals. (R. 34a–35a, 48a–51a; Supp. R. 1b–8b, 15b–23b.) In 1951 and 1952, these had been recorded in the books as cash sales, and so were reflected in taxpayers' gross receipts on their tax returns for those years. (R. 151a–152a.) After December 31, 1952, however, they were no longer shown on the books as income items and they were not reflected on the petitioners' tax returns. (R. 34a–36a, 152a.) These rental items totaled $18,648.83, $31,127.37, $30,215.63 and $23,583 for the years 1956, 1957, 1958, and 1959, respectively. (R. 109a, 111a–112a.)

Other unrecorded and unreported items consisted of certain checks paid to Mr. Werling by the partnership (R. 37a, 40a, 51a–52a, 154a; Supp. R. 14b, 23b–25b) and receipts from the use of a school bus furnished by petitioners (R. 36a, 111a–112a; Supp. R. 8b–11b, 32b–33b). Together, these items amounted to several thousand dollars in each of the years 1957, 1958, and 1959. The checks from the partnership were also unreported in 1956 and petitioners' 1959 return further failed to include $208.85 in interest from a savings account which, though never mentioned by petitioners during the first eight months of the special agent's investigation, had a balance of $28,856.45 at the close of the indictment period (R. 48a, 112a, 283a).[5]

[5] Most of the deposits to this account consisted of checks from the partnership, and the deposits in 1959 alone totalled approximately $25,000. (Supp. R. 27b–29b, 35b.) The government showed other large cash expenditures during this pe-

1. Petitioners' contention (Pet. 7–10) that the government failed to prove willfulness is rebutted by the record. The evidence of willfulness was overwhelming.

First, there was "evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records." *Holland* v. *United States*, 348 U.S. 121, 139. See also *United States* v. *Alker*, 260 F. 2d 135, 148 (C.A. 3), certiorari denied, 359 U.S. 906; *United States* v. *Frank*, 245 F. 2d 284, 287 (C.A. 3), certiorari denied, 355 U.S. 819. The clear inference of willfulness from this behavior is further buttressed by the fact that the major sources of omitted income, the truck rentals and checks from the partnership, were reflected in petitioners' gross receipts on their tax returns in 1951 and 1952, but not in the indictment years. Beyond this, petitioners' pattern of spending during these years[*] made implausible their claim that they were unaware of their taxable income. *United States* v. *Cindrich*, 241 F. 2d 54, 56 (C.A. 3). Finally, petitioners' long failure to disclose to the Service the existence of the savings account into which they had deposited over

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riod. For example, petitioners repaid almost $28,000 worth of bank loans during the years 1956 through 1959. (Govt. Ex. 25; Supp. R. 29b, 33b–35b.) In 1957 they spent in excess of $10,000 in remodeling their home and purchasing major appliances for it. (R. 91a–104a.) In the same year they bought a new Cadillac, and they traded in the Ford car which they used in their business on a new Ford in 1956, 1958, and 1959. (R. 227a, 239a, 280a–281a.)

[*] See fn. 5, *supra*.

$28,000 from 1957 through 1959 itself tends to show willfulness. *Sherwin* v. *United States*, 320 F. 2d 137, 141–142 (C.A. 9), certiorari denied, 375 U.S. 964.

The fact that Mrs. Werling kept the books, although a factor for the jury to consider in determining Mr. Werling's guilt, could hardly require an acquittal. A taxpayer cannot insulate himself from prosecution merely by having another person keep his books and prepare his tax returns. Mr. Werling was always present when the accountant was given the information to prepare the tax returns, and he had access to the books. It was for the jury to determine whether or not he was aware of what they contained. Indeed, considering his obvious ability as a businessman, whose gross receipts were over $100,000 a year, it is highly unlikely that he could have been as uninformed and uninterested in his business income as he would have had the jury believe (R. 224a, 227a–231a, 238a–239a).

2. Petitioners' contentions (Pet. 10–11) that the district court erred in admitting certain testimony are insubstantial.

Special Agent Tymoczko was recalled as a witness for the sole purpose of testifying as to facts which his investigation revealed, *i.e.*, that in 1951 and 1952 the truck rentals and checks from the partnership were entered on petitioners' books as cash sales, and so were part of the gross income reported in their tax returns for those years. (R. 150a–152a.) Such direct evidence of facts learned during an agent's investigation is of course admissible, as even the cases

relied upon by petitioners show (Pet. 10). See *United States* v. *Michener*, 152 F. 2d 880, 883 (C.A. 3), and *United States* v. *Ward*, 169 F. 2d 460, 462 (C.A. 3).

Revenue Agent Lipski testified as an expert as to his computation of unpaid taxes. (R. 104a–114a.) He stated that everything in this computation came from the testimony and exhibits introduced at the trial (R. 106a–107a), and, during an extensive cross-examination (R. 114a–141a), petitioners' counsel was unable to show that any items were not based on evidence in the record. The computation was therefore admissible. *United States* v. *Johnson*, 319 U.S. 503, 519; *United States* v. *Ward*, 169 F. 2d 460 (C.A. 3).

For the reasons set forth above the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
BURTON BERKELEY,
Attorneys.

MAY 1964.